



Administrative Tribunal

Distr.
LIMITED

AT/DEC/921
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 921

Case No. 996: PACE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chitharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas, at the request of John Pace, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 1997, the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 December 1997, the Applicant filed an application requesting the Tribunal:

"... to find:

- (a) That staff rule 103.20 does not deny eligibility to an education grant to a child who does not reach five years of age during the school year;
- (b) That administrative instruction ST/AI/181/Rev.10 does not deny eligibility to an education grant to a child who receives primary education but who does not reach five years of age during the school year;
- (c) That the Administration wrongfully applied staff rule 103.20 and administrative instruction ST/AI/181/Rev.10 in denying the eligibility of his son to an education grant for the scholastic year 1995-1996;

... [and] to order:

That the Respondent pay the education grant for his son Patrick for the school year 1995-1996, the school fees in question amounting to SF 11,380 (...), plus interest calculated from the date the grant became due (...)"

Whereas the Respondent filed his answer on 30 December 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 January 1966, on a two-year fixed-term contract as Junior Professional Trainee at the P-1 level, in the offices of the Secretary-General. On 1 September 1967, he was transferred for a probationary period to the Human Rights Division as Assistant Human Rights Officer. On 1 March 1968, the Applicant's appointment became permanent, and he was promoted to the P-2 level as Associate Human Rights Officer. On 1 April 1971, he was promoted to the P-3 level and his functional title changed to Human Rights Officer. The Applicant was transferred to Geneva on 1 March 1974 and promoted to the P-4 level on 1 July 1974. On 26 March 1979, the Applicant's functional title changed to Chief, Special Procedures Unit, and he was promoted to the P-5 level on 1 August 1980. On 10 August 1988, his functional title changed to Chief, External Relations, Publications and Documentation Section. On 1 March 1989, he was promoted to the D-1 level.

On 25 July 1991, the Applicant's son was born. On 30 June 1995, the Applicant submitted a request for an advance against the education grant with respect to his son for the Scholastic Year 1995/96. On 26 July 1995, the Personnel Officer, Personnel Administration Section (PAS), informed the Applicant that his request was denied because:

"according to established guidelines, the grant is not payable in respect of attendance at a kindergarten or nursery school at the pre-primary level ... In respect of the school year in which the child reaches the age of 5, the grant may be paid if it can be

shown, on the basis of information provided by the school, that the basic elements of a formal education are included in the instruction. Therefore, since [your son] will reach the age of 5 on 25 July 1996, i.e., after the completion of the 1995/96 school year, you are not eligible to receive the grant in his respect."

On 1 August 1995, the Applicant requested the Personnel Officer, PAS, to reconsider the decision to deny the Applicant the education grant advance. He explained that his son "will be receiving a formal education, if he were to get the opportunity to attend from the coming September" and that "he has been attending a nursery school this current year and already possesses some elements, such as identifying and writing certain letters, numbers, etc." He also pointed out that his son's fifth birthday would occur a short time after the end of the school term.

On 4 August 1995, the Personnel Officer, PAS, replied to the Applicant, confirming that under staff rule 103.20 (b) (i), "The three factors in establishing that the instruction is at the primary level are that the child must reach the age of 5 during the school-year in question, that the school (whether pre-kinder or kinder) provides the basic elements of a formal education and thirdly, that attendance be on a full time basis." The Personnel Officer noted that "unfortunately, the fact that he will only reach the age of 5 after the end of the school year (whether a day, or week or a month later, is not important), precludes the entitlement to an education grant in his respect."

On 14 August 1995, the Applicant requested the Secretary-General to review the decision dated 4 August 1995, rejecting his request for an education grant advance.

In the absence of a reply from the Secretary-General to the Applicant's request for review within the applicable time-limit, on 30 October 1995, the Applicant lodged an appeal with the JAB in Geneva.

The JAB adopted its report on 21 May 1997. Its conclusion, recommendation, and special remark read as follows:

Conclusion and recommendation

23. The Panel concluded that according to administrative instruction ST/AI/181/Rev.10 and the administrative practice followed by the United Nations, the Appellant was not entitled to receive education grant in respect of his son Patrick for the school year 1995-1996.

24. In the light of the above, the Panel makes no recommendation in support of this appeal.

Special remark

25. While considering this case, the Panel noted that the wording of article 25 (a) of administrative instruction ST/AI/181 could suggest different interpretations and that the age requirement might be understood as a presumption only applicable to cases in which there is a doubt regarding the level of education the child is receiving, i.e. formal or preschool. From this perspective and as Headquarters stated that there is an established administrative practice for the interpretation of eligibility under this administrative instruction, the Panel believes that it would in the interest of both the Organization and staff members to modify the present wording of the administrative instruction in order to avoid continued misinterpretation.

26. The Panel also wishes to draw the Secretary-General's attention to the fact that in some education systems children may receive a formal education before the age of five or that some gifted children may be authorized to attend at the primary level; while not having met the UN age requirement. The Panel believes that the Organization could eventually show some flexibility in interpreting those specific cases, although the modalities of how this more flexible approach might be implemented would require further deliberations on the part of the CCAQ [Consultative Committee on Administrative Questions].

On 17 September 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

“ ...

The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's statement confirming that administrative instructions are part of a United Nations staff member's terms of appointment and that the United Nations Administrative Tribunal has stated that ST/AI/181 has the same force and effect as a staff rule, which confirms that this administrative instruction is consistent with the Staff Regulations. He has also taken note of the Board's conviction that the UNOG Administration did not violate the applicable rules and respected the general principle of equality of treatment. According to United Nations practice, a staff member whose child does not fulfill both the requirement of age and that of formal education is not entitled to education grant and in the present case your son did not meet the age requirement.

The Secretary-General has finally taken note of the Board's conclusion that, according to administrative instruction ST/AI/181/Rev.10 and administrative practice followed by the United Nations, you were not entitled to receive education grant in respect of your son Patrick for the school year 1995-1996, and of the Board's determination to make no recommendation in support of your appeal. The Secretary-General has accordingly decided to accept the Board's recommendation and to take no further action regarding your case.

..."

On 23 December 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Under staff rule 103.20, the condition of a "formal education" is the sole condition in determining eligibility for education grant. Because the Applicant's son received a formal education during the 1995/96, the Applicant was entitled to an education grant advance with respect to his son. That his son had not reached the age of five should not have precluded him from receiving the entitlement.

2. The Administration improperly applied staff rule 103.20 and administrative instruction ST/AI/181/Rev.10 in denying the Applicant the education grant in respect of his son.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to an education grant under the applicable staff rules and administrative instruction.
2. Administrative instruction ST/AI/181/Rev.10 correctly implements staff rule 103.20 (b). The staff rule establishes that an education grant is not payable in respect of schooling at the pre-primary level; the administrative instruction defines what should be considered education at the pre-primary level.

The Tribunal, having deliberated from 1 to 23 July 1999, now pronounces the following judgement:

- I. The Applicant appeals the Respondent's decision of 17 September 1997, accepting the JAB's recommendation that the Applicant was not entitled to receive payment of an education grant in respect of his son for the school year 1995-1996 because the son had not attained the age of five during that school year. The JAB's recommendation was based on its interpretation of the administrative instruction ST/AI/181/Rev.10, paragraph 25, concerning the requirements for payment of the education grant for children attending nursery school or kindergarten. The Applicant claims that the Respondent's decision not to pay him the education grant violated staff rule 103.20, governing staff entitlement to education grants, as such rule does not limit the entitlement on the basis of a child's age. He further claims that the Respondent improperly applied administrative instruction ST/AI/181/Rev.10, and that in doing so, violated the spirit of staff rule 103.20.
- II. Staff rule 103.20 (b) provides in pertinent part that:

“A staff member who is regarded as an international recruit ..., and who resides and serves at a duty station which is outside his or her home country, shall be entitled to an education grant in respect of each child in full-time attendance at a school, university or similar educational institution ... The grant shall not, however, be payable in respect of:

- (i) Attendance at a kindergarten or nursery school at the pre-primary level ...” (Emphasis added)

In paragraph 25 (a) of administrative instruction ST/AI/181/Rev.10, the Secretary-General reiterated the exclusion mandated by staff rule 103.20 (b) (i) and defined when education is to be considered to be at the primary or pre-primary level. Paragraph 25 (a) reads as follows:

“25. ... as specified in staff rule 103.20, the grant is not payable in the following cases:

- (a) Kindergarten or nursery school. The grant is not payable in respect of attendance at a kindergarten or nursery school at the pre-primary level. In those cases where there is difficulty in determining whether education is primary or pre-primary, it will be presumed to be primary from the school year during which the child reaches the age of 6 and presumed to be pre-primary during school years in which the child has not reached the age of 5. In respect of the school year in which the child reaches the age of 5, the grant may be paid if it can be shown, on the basis of information provided by the school, that the basic elements of a formal education are included in the instruction. No grant is payable if attendance is not full-time;”

The Tribunal notes that this provision of ST/AI/181/Rev.10 interprets the conditions for entitlement to an education grant set forth in the staff rule, so as to allow payment of the education grant with respect to a child who turns five during the school year, despite his or her attendance at what might normally be called a “nursery school” or “kindergarten”, if the staff member proves that the child is receiving “the basic elements of a formal education” and that the attendance is full-time. Under no condition can the grant be paid for attendance at a

nursery school or kindergarten if the child has not reached the age of five during the school year at issue.

III. A plain reading of the second sentence of paragraph 25 (a) of ST/AI/181/Rev.10 leads to the inexorable conclusion that the Applicant's son, having not reached the age of 5 during the 1995-1996 school year, was presumed to be at the "pre-primary level". The Applicant argues that the second sentence only applies in "cases where there is difficulty determining whether the education is primary or pre-primary". He claims that in his son's case, there is no difficulty in making such determination since the Administration has already admitted that his son's schooling contains the "basic elements of a formal education". The Applicant thus appears to be arguing that if a child's instruction includes "basic elements of a formal education", then such instruction is the equivalent of education "at the primary level", and there is no need to consider the age of the child.

The administrative instruction, when read as a whole, clearly does not intend to equate instruction having "basic elements of a formal education" with education "at the primary level." Rather, the administrative instruction expressly requires a two-step process. First, the Administration determines whether the child is over six years old or under five years old during the school year. If over six, the child is presumed to be at the "primary" level. If under five, as the Applicant's child was during the school year 1995-1996, the child is presumed to be at the "pre-primary" level. Second, in respect of a child who turns five during the school year, the administrative instruction gives parents of children in nursery school or kindergarten the opportunity to receive an education grant, if proof can be provided from the school "that the basic elements of a formal education are included in the instruction" and that the child's attendance is full-time.

IV. Staff regulation 3.2 provides, in relevant part, as follows:

“(a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. ...”

The General Assembly therefore accorded broad discretionary powers to the Secretary-General to set forth the rules concerning the payment of education grants. The Tribunal wishes to reiterate the principles stated in Judgement No. 237, Powell, para. XIII (1979), that:

“... under Article 97 of the Charter the Secretary-General is the chief administrative officer of the Organization. Under Article 101 the staff shall be appointed by the Secretary-General under regulations established by the General Assembly. The Staff Regulations of the United Nations state under the title ‘Scope and purpose’ that ‘the Secretary-General, as the chief administrative officer, shall provide and enforce such staff rules consistent with these principles *as he considers necessary*’. [Emphasis added]. Thus the Secretary-General has discretion in framing the Staff Rules and in applying the Staff Regulations. In the exercise of these functions, the Secretary-General issues administrative orders and information circulars which the Tribunal has held to have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations. ...”

The Tribunal quoted this statement in Judgement No. 337, Cordovez, para. IV (1984), in support of its holding that a provision concerning the travel expenses granted in connection with education grants, in an earlier version of the same administrative instruction at issue here, “not being inconsistent with the Staff Regulations, has the same force and effect as a staff rule”, and therefore was properly applied to that applicant's case.

V. The Tribunal holds in the present case that the application of the administrative instruction ST/AI/181/Rev.10 is not inconsistent with staff regulation 3.2, which gives the Secretary-General the authority to establish the terms and conditions of the payment of the

education grant. Paragraph 25 (a) of ST/AI/181/Rev.10 simply defines a term in the staff rule, namely what should be considered “nursery school or kindergarten *at the pre-primary level*”. (Emphasis added). The definition interprets the conditions for receiving the entitlement to include children of staff members who might otherwise have been excluded from receiving the education grant had a different interpretation of the staff rule been adopted by the Secretary-General.

VI. The Applicant argues that the administrative instruction should not be interpreted so as to contravene the letter and spirit of staff rule 103.20, “which seeks to assist eligible staff members in educating their children.” The Applicant thus implies that the administrative instruction is in conflict with the staff rule. The Tribunal finds no such conflict. If there were a conflict between the administrative instruction and the staff rule, this would raise a separate issue that the Tribunal is not called upon to decide in this case.

The Tribunal finds that the Respondent’s application of the administrative instruction violates neither the letter nor the spirit of staff rule 103.20. On the contrary, in promulgating ST/AI/181/Rev.10, the Secretary-General acted within his discretionary power under staff regulation 3.2 to set out the terms for the eligibility for entitlement to the education grant under staff rule 103.20 (b) for parents whose children have reached the age of five during the school year and are receiving instruction with “basic elements of formal education”. The Tribunal further finds that the interpretation given to the staff rule in the administrative instruction is not arbitrary, nor does it constitute an abuse of discretion. If it had been arbitrary or an abuse of discretion, it would not have been allowed to stand. The Tribunal holds that the interpretation of the staff rule set out in ST/AI/181/Rev.10 must be given effect.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Mayer GABAY

Vice-President, presiding



Chittharanjan Felix AMERASINGHE
Member



Victor YENYI OLUNGU
Member



Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

